Supreme Court, U.S.
FILED

No. (1)

95-930 DEC 12 1995

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In The

Supreme Court of the United States

October Term, 1995

RADOSLAV MARIC, M.D.,

Petitioner,

vs.

ST. AGNES HOSPITAL CORP.; ROBERT J. STACKPOLE; ROBERT J. STANLEY; VINCENT DU VIGNEAUD, JR., M.D.; VINCENT NICOLAIS, M.D.; JOEL GREENSPAN, M.D.; MICHAEL W. PANIO, M.D.; DONALD N. COHEN, M.D.; VITO MARRERRO, M.D.; BARNEY D. NEWMAN, M.D.; ADRIENNE WEISS-HARRISON, M.D.; ELLIOT MOSHMAN, M.D.; GERALD CAMPANA, M.D.; WILLIAM ZAROWITZ, M.D.; VIRGINIA PELLIGRINO,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Where physicians conspire to eliminate a competitor whose planned birthing center would have drastically reduced the price of delivering a baby, can the respondents avoid liability by charging the petitioner competitor with malpractice without providing the petitioner an opportunity to demonstrate that the charge is pretextual?

II. Does a group boycott by independent physicians and a single hospital sufficiently affect interstate commerce to violate Section 1 of the Sherman Act?

PARTIES TO THE PROCEEDING

Radoslav Maric was the plaintiff in the lower courts.

St. Agnes Hospital Corp.; Robert J. Stackpole; Robert J. Stanley; Vincent Du Vigneaud, Jr., M.D.; Vincent Nicolais, M.D.; Joel Greenspan, M.D.; Michael W. Panio, M.D.; Donald N. Cohen, M.D.; Vito Marrerro, M.D.; Barney D. Newman, M.lD.; Adrienne Weiss-Harrison, M. D.; Elliot Moshman, M.D.; Gerald Campana, M.D.; William Zarowitz, M.D.; Vitginia Pelligrino were defendants in the lower courts.

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No.

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RADOSLAV MARIC, M.D.,

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ST. AGNES HOSPITAL CORP.; ROBERT J. STACKPOLE; ROBERT J. STANLEY; VINCENT DU VIGNEAUD, JR., M.D.; VINCENT NICOLAIS, M.D.; JOEL GREENSPAN, M.D.; MICHAEL W. PANIO, M.D.; DONALD N. COHEN, M.D.; VITO MARRERRO, M.D.; BARNEY D. NEWMAN, M.D.; ADRIENNE WEISS-HARRISON, M.D.; ELLIOT MOSHMAN, M.D.; GERALD CAMPANA, M.D.; WILLIAM ZAROWITZ, M.D.; VIRGINIA PELLIGRINO,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Radoslav Maric respectfully prays that a writ of certiotatri be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 13, 1995.

OPINIONS BELOW

The decision of the Court of Appeals is found at Appendix A. The opinion of the district court is found at Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September, 13, 1995 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

15 U.S.C. § 1:

> Section 1 forbids "any contract, combination ... or conspiracy, in [unreasonable] restraint of trade. . . ."

STATEMENT OF THE CASE

A. Background Information

On July 1, 1989, petitioner joined the Northeast Permanent Medical Group, P.C. ("NPMG"), Weschester County, N.Y. He soon thereafter obtained staff privileges at St. Agnes Hospital. In April of 1990, he disclosed to the respondents his plans to open a competitive enterprise, a birthing center. On May 21, 1990, respondents suspended petitioner's hospital privileges in violation of the hospital's by-laws. The discipline was ostensibly based upon the death of a pregnant woman as a result of an extremely rare ectopic pregnancy. Petitioner then filed suit in the District Court, alleging a group boycott, under Section 1 of the Sherman Act, and intentional interference with contract and prospective contractual relationships.

Sherman Act, and intentional interference with contract and prospective contractual relationships.

B. The Proceedings Below

This petition is being filed as a result of the Order and Opinion of the United States Court of Appeals for the Second Circuit affirming the summary judgment order entered by the District Court on March 11, 1994 without having allowed any discovery. A copy of the Court of Appeals decision is appended.

REASONS FOR GRANTING THE WRIT

I.

WHERE PHYSICIANS CONSPIRE TO ELIMINATE A COMPETITOR WHOSE PLANNED BIRTHING CENTER WOULD HAVE DRASTICALLY REDUCED THE PRICE OF DELIVERING A BABY, CAN THE RESPONDENTS AVOID LIABILITY BY CHARGING THE PETITIONER COMPETITOR WITH MALPRACTICE WITHOUT PROVIDING THE PETITIONER AN OPPORTUNITY TO DEMONSTRATE THAT THE CHARGE IS PRETEXTUAL?

Where medical costs are increasingly depleting the resources of our nation's citizenry and of our government, should this Court discourage doctors from conspiring to eliminate low cost competitive alternatives?

Petitioner is an obstetrician. Prior to the events in question, he had delivered over six thousand babies and had never lost his hospital staff privileges or lost a malpractice case.

After disclosing to the respondents his plans for a birthing center, which would have been a direct and low cost competitor to

their established medical practices, the respondents curtailed his staff privileges, causing him to lose the opportunity to open the birthing center (under New York law, the petitioner was required to have staff privileges at a hospital no more than 20 minutes away from the center). The bases for the curtailment were two cases out of 6,000 deliveries. One involved a pregnant patient who, according to the medical records, had been in a cocaine induced coma. Dr. Maric was accused of failing to recognize an ectopic tubal pregnancy, five months after the event, even though such a pregnancy was extremely rare for a nineteen week pregnancy, and even though a cocaine induced coma made such a diagnosis impossible.

The second patient miscarried. Respondents charged that Dr. Maric's decision not to return to the hospital was improper, even though the report given to him by the nurse did not indicate a need for him to return and even though the miscarriage could not have been prevented anyway, had he returned.

Dr. Maric was prevented from taking any discovery to prove that these bases were completely pretextual. He was deprived of the opportunity to show that his record was as good as other doctors at the hospital, and that other doctors who may have been involved in analogous situations were not sanctioned.

Unless certiorari is granted, then doctors who eliminate a competitor will have no reason to fear an antitrust suit. They can always come up with a pretext and the courts will accept their word that the pretext was the real reason for their scheme.

competitor will have no reason to fear an antitrust suit. They can always come up with a pretext and the courts will accept their word that the pretext was the real reason for their scheme.

II.

DOES A GROUP BOYCOTT BY INDEPENDENT PHYSICIANS AND A SINGLE HOSPITAL SUFFICIENTLY AFFECT INTERSTATE COMMERCE TO VIOLATE SECTION 1 OF THE SHERMAN ACT.

The Court of Appeals affirmed the finding that "the defendants, operating a single hospital, lacked the market power necessary to have a substantially harmful effect on competition in obstetrical services." (18a). Because a group boycott is per se unlawful, the Second Circuit's holding conflicts with decades old precedent of this Court. *United States v. General Motors Corp.*, 384 U.S. 127 (1966), *Fashion Originators Guild of America v. FTC*, 312 U.S. 457 (1941).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ENTERED SEPTEMBER 13, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No 763 — August Term 1994
(Argued January 20, 1995 Decided SEP 13 1995)

Docket No. 94-7569

RADOSLAV MARIC,

Plaintiff-Appellant,

– v. –

ST. AGNES HOSPITAL CORP.; ROBERT J. STACKPOLE: ROBERT J. STANLEY, VINCENT DU VIGNEAUD, JR., M.D.; VINCENT NICOLAIS, M.D.; JOEL GREENSPAN, M.D.; MICHAEL PANIO, M.D.; DONALD N. COHEN, M.D.; VITO MARRERRO, M.D.; BARNEY D. NEWMAN, M.D.; ADRIENNE WEISS-HARRISON, M.D.; ELLIOT MOSHMAN, M.D.; GERALD CAMPANA, M.D.; WILLIAM ZAROWITZ, M.D.; VIRGINIA PELLIGRINO,

Defendants-Appellees.

Before: WALKER, LEVAL, and CALABRESI, *Circuit Judges.*

Appeal by plaintiff from an order of summary judgment before the United States District Court for the Southern District of New fork (Brieant, *J.*) dismissing plaintiff's antitrust claim on

the grounds that a conspiracy to restrain trade had not been shown and dismissing plaintiff's state law claims without prejudice.

Affirmed.

STEVEN M. KRAMER, Steven M. Kramer & Associates, New York, New York, *for Plaintiff-Appellant.*

RICHARD E. DONOVAN, Kelley Drye & Warren (Roy W. Breitenbach, of counsel), New York, New York, *for Defendants-Apsellees* St. Agnes Hospital Corp., Robert J. Stackpole, Robert J. Stanley, Vincent du Vigneaud, Jr., M.D., Vincent Nicolais, M.D., Donald M. Cohen, M.D., Vito Marrero, M.D., and Virginia Pelligrino.

WAYNE M. RUBIN, Rende, Ryan & Downes, New York, New York, *for Defendants-Appellees* Barney D. Newman, M.D., Adrienne Weiss-Harrison, M.D. Elliot Moshman, M.D., Gerald Campana, M.D., and William Zarowitz, M.D.

Appendix A

WALKER, *Circuit Judge:*

Plaintiff Dr. Radoslav Maria, a licensed obstetrician and gynecologist, filed this suit alleging, among other claims, that defendants conspired to deny him hospital privileges in order to prevent him from opening a birthing center that would compete with their practices. He contended that this conduct constituted a violation of the antitrust laws, namely the Sherman Act, 15 U.S.C. § 1, and was thus actionable under the Clayton Act, 15 U.S.C. §§ 15, 26. The United States District Court for the Southern District of New York (Charles L. Brieant, *District Judge*) granted summary judgment in favor of defendants on the antitrust claim and dismissed the remaining state law claims without prejudice. We affirm.

BACKGROUND

On July 1, 1989, Dr. Maric joined the Northeast Permanente Medical Group, P.C. ("NPMG"), a professional corporation that provides physician services to a health maintenance organization, Kaiser Foundation Health Plan of New York ("Kaiser"). As NPMG and Kaiser required, Maric soon after obtained staff privileges at St. Agnes Hospital ("St. Agnes").

After several months at St. Agnes, Dr. Maria told the President of St. Agnes, defendant Dr. Robert J. Stanley, that he wanted to open a birthing center that would feature a method of childbirth in which delivery occurred under water, an idea that he had entertained for the better part of ten years. According to Dr. Maric's complaint, Dr. Stanley promised his cooperation and signed a non-disclosure agreement on behalf of the hospital.

On November 26, 1989, Lori Cherry, a Kaiser subscriber,

entered St. Agnes complaining of abdominal pain. She was five months pregnant. After Ms. Cherry lost consciousness, stopped breathing, and had no pulse, Dr. Maric and an internist were summoned. Dr. Maric arrived at the hospital at 11:30 p.m. and examined Ms. Cherry. By that time, she had spontaneously started breathing again and regained blood pressure but remained in a semicomatose state. Dr. Maric concluded that her condition was not related to her pregnancy and, after discussing the case with the internist, left the hospital at approximately 1:00 a.m. Unfortunately, Dr. Maric's conclusion was wrong. His patient died a few hours later from a ruptured ectopic tubal pregnancy.

As New York law required, the hospital reported Ms. Cherry's death to the New York State Department of Health ("DOH"), which initiated an investigation into the incident. In addition, the case was taken up at a number of meetings of various hospital committees at St. Agnes, including the Executive Committee, the Emergency Department, the Morbidity and Mortality Committee, the Medical Board, the Board of Trustees Quality Assurance Committee, and the Medical Peer Review Committee. On December 20, 1989, the Medical Peer Review Committee referred the matter to the Obstetrics and Gynecology Department, which held a peer review meeting on February 13, 1990. The Department concluded that Dr. Maric's management of the case was deficient principally because he failed to order certain tests, neglected to obtain a surgical consultation, and left the patient before a diagnosis was reached.

On March 22, 1990, Dr. du Vigneaud, the Director of the Department of Obstetrics and Gynecology and a defendant, presented the peer review's findings to the Board of Trustees Quality Assurance Committee. He recommended that Dr. Maric be informed that his cases would be monitored by the Obstetrics

and Gynecology Department until further notice. The Quality Assurance Committee, concerned that these corrective measures might be inadequate in light of the seriousness of the case, ordered further review of the matter before recommending corrective action to the Board of Trustees.

In early April, 1990, while the foregoing review was underway, Dr. Maric informed Dr. du Vigneaud that he intended to purchase an existing obstetrics and gynecology practice to use as his birthing center. Under New York law, such a center must have procedures to transfer a patient to a hospital no more than twenty minutes away in case of complications. 10 NYCRR § 754.2(e). New York law also requires the director of such a center to have either obstetrical privileges at the hospital or a formal agreement with the hospital for the provision of necessary care. 10 NYCRR § 754.5(a)(1)-(2).

Meanwhile, following meetings on April 11 and 19 at which Ms. Cherry's death was discussed, the Quality Assurance Committee recommended that the hospital monitor Dr. Maric's and the internist's cases for a period of six months, and on April 24 the hospital sent Dr. Maric a letter to that effect. On May 4, less than two weeks later, another incident occurred that called plaintiff's professional judgment into question. A woman who was approximately twelve weeks pregnant was admitted to the hospital exhibiting signs of a possible miscarriage. Although both the duty nurse and the patient's husband called Dr. Maric repeatedly, he refused to come to the hospital. He claimed that he had been summoned by the woman earlier and had waited at the hospital for her but she had not shown up, and that in any event he was not needed.

On May 10, the State Department of Health cited St. Agnes

for its treatment of Ms. Cherry. The deficiencies included Dr. Maric's failure to order certain tests and his decision to leave the hospital despite the patient's rapidly deteriorating condition. Faced with this assessment of the earlier incident and Dr. Maric's behavior on May 4, the Board of Trustees summarily suspended plaintiff's hospital privileges on May 17, 1990. NPMG then terminated him for failure to maintain staff privileges at St. Agnes.

Thereafter, Dr. Maric requested, pursuant to the hospital's by-laws, that an ad hoc committee be formed to review his suspension. The committee, comprised of Drs. du Vigneaud, Donald Cohen, and Michael Panio — all defendants in this action — interviewed Dr. Maric and examined the facts of the case before reaching an independent conclusion that summary suspension was appropriate. Dr. Maric then asked for and was given permission to present his case at an upcoming Medical Board meeting. The Board, after hearing Dr. Maric, recommended that the suspension be rescinded and that he instead be put on probation for one year, conduct all work under strict supervision, and receive a letter of reprimand. The Board of Trustees accepted this recommendation.

Dr. Maric filed suit in December of 1993. He alleged that the restrictions placed on him by the hospital forced him to abandon his plans for a birthing center, and that the hospital, its administrators, and the various doctors serving in its departments and on its committees had conspired to restrict his staff privileges, thus constituting a group boycott in violation of the Sherman Act and actionable under the Clayton Act. He also pressed a state law claim for intentional interference with contract and prospective contractual relations. On May 11, 1994, the district court granted the defendants summary judgment on

plaintiff's antitrust claims and dismissed the state law claim without prejudice. Plaintiff appeals.

DISCUSSION

As the foregoing recitation of facts makes clear, the hospital, faced with what was at the least questionable conduct on the part of Dr. Maric, followed a course of action that was reasoned, responsible, and attentive not only to its own interests but also to those of the public and Dr. Maric. Perhaps due to poor advice of counsel or an inability to perceive that his personal ambitions must at times yield to the hospital's interest in the health and safety of its patients, Dr. Maric has chosen to respond with a baseless antitrust claim that only serves to deplete the resources of the defendants and the courts. The district court correctly concluded that this antitrust claim cannot survive summary judgment.

I. The Antitrust Claim

The first count of Maric's complaint asserts a claim under the Clayton Act. Under § 4 of the Clayton Act, 15 U.S.C. § 15(a), a plaintiff "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble damages. In order to defeat a motion for summary judgment, Dr. Maric must create a genuine issue of material fact that (1) defendants violated the antitrust laws and (2) the violation caused him actual injury. *See New York v. Hendrickson Bros. Inc.*, 840 F.2d 1065, 1076 (2d Cir.) (citing *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981)), *cert. denied*, 488 U.S. 848 (1988). Dr. Maric has failed to demonstrate a genuine issue of material fact as to the violation of the antitrust laws.

Appendix A

The antitrust violation that Dr. Maria alleges is that defendants violated § 1 of the Sherman Act. Under § 1, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. In order to establish a claim under § 1, a plaintiff must therefore show (1) a contract, combination, or conspiracy; (2) in restraint of trade; (3) affecting interstate commerce. *See Capital Imagine Assocs. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 542 (2d Cir.), *cert. denied*, 114 S. Ct. 388 (1993). Plaintiff has failed to meet the first of these requirements.

The district court, drawing on *Capital Imaging*, concluded that, as employees of St. Agnes, the staff doctors and administrators did not have the legal capacity to conspire under the Sherman Act. The *Capital Imaging* decision, in holding that member physicians of an independent practice association are legally capable of conspiring with each other, noted that "the doctors are not staff physicians employed by the HMO on a salaried basis, that is, they are not agents of the HMO." 996 F.2d at 544. While this passage could be read to suggest, as the district court held, that staff physicians who *are* agents of an organization like an HMO or a hospital cannot conspire with the HMO or each other for antitrust purposes, we have not explicitly decided this issue.

We need not decide whether the individual defendants in this case, at least some of whom presumably are full-time staff physicians at the hospital, have the legal capacity to conspire together or with the hospital under § 1 of the Sherman Act. It is abundantly clear to us that, even assuming the legal capacity to conspire, no conspiracy has been shown.

Appendix A

In *Capital Imaging* we described the plaintiff's burden at the summary judgment stage to show an antitrust conspiracy:

> The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred. A plaintiff must prove the defendants illegally conspired. . . . [T]his means that a plaintiff — to withstand defendants' summary judgment motion — must present evidence that casts doubt on inferences of independent (not combined) action or proper conduct by defendants.

996 F.2d at 545; *see also International Distribution Ctrs. v. Walsh Trucking Co.*, 812 F.2d 786, 793 (2d Cir.) ("At a minimum, . . . the circumstances [must be] such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." (internal quotations omitted)), *cert. denied*, 482 U.S. 915 (1987); *Brenner v. World Boxing Council*, 675 F.2d 445, 451 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982).

We do not have the slightest doubt that defendants acted properly when they decided to limit Dr. Maric's staff privileges. Several different committees and departments within the hospital investigated and reviewed the circumstances leading to Lori Cherry's death, and all of the evidence points inexorably to the conclusion that the various staff members charged with scrutinizing plaintiff's behavior did so with care and reasoned deliberation. There is no credible dispute that this lengthy review process yielded serious, legitimate concerns as to plaintiff's conduct. The hospital's ultimate decision to allow Dr. Maric to

maintain his staff privileges under supervision instead of suspending or revoking them, under these circumstances, was generous towards the plaintiff. Without further evidence of action on the part of defendants that suggests "commitment to a common end" other than their professed goal of maintaining the standards of medical care at the hospital, the sole fact that some of the defendants may in the future have faced some competition from Dr. Maric's hypothetical birthing center is insufficient to create a genuine issue of material fact as to the existence of a conspiracy to restrain trade. *See Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1043 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976).

While this case might well be a candidate for sanctions in light of the baseless nature of plaintiff's antitrust claim and the waste of resources that it has generated, because the issue of sanctions has not been raised, we will confine ourselves to affirming the district court's dismissal. Accordingly, we hold that the district court correctly granted summary judgment to defendants on plaintiff's antitrust claim.

II. Remaining State Law Claims

After dismissing Maric's antitrust claim, the district court then dismissed the remaining state law claims without prejudice. Although a district court retains the discretion to exercise pendant jurisdiction and entertain state law claims once all federal claims have been dismissed, *see Enercomp, Inc. v. McCorhill Publishing*, 873 F.2d 536, 545 (2d Cir. 1989), generally "if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well," *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *see Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 72 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976). We are unable to fault the district court in doing so here.

Appendix A

CONCLUSION

For the reasons stated above, we affirm the judgment of the district court.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 11, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Memorandum and Order
93 Civ. 8435 (CLB)

Radoslav Maric,

Plaintiff,

-against-

St. Agnes Hospital Corp., Robert J. Stockpole, Robert J. Stanley, Vincent du Vigneaud Jr., M.D., Vincent Nicolais, M.D., Joel Greenspan, M.D., Michael W. Panio, M.D., Donald N. Cohen, M.D., Vito Marrero, M.D., Barney D. Newman, M.D., Adrienne Weiss-Harrison, M.D., Elliot Moshman, M.D., Gerald Campana, M.D., William Zarowitz, M.D., and Virginia Pellegrino,

Defendants.

Brieant, J.

Defendants St. Agnes Hospital, Stackpole, Stanley, Du Vigneaud, Nicolais, Greenspan, Panio, Cohen, Marrero and Pellegrino move, pursuant to FRCP 12(b)(6), to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. Defendants Newman, Weiss-Harrison, Moshman, Campana, and Zarowitz move, pursuant to FRCP

Appendix B

Rule 56(b), for summary judgment dismissing the action, or, in the alternative, to dismiss the action pursuant to FRCP Rule 12(b)(6) for failure to state a claim.

Plaintiff brought this suit pursuant 15 U.S.C. 15 and 26, (the Clayton Act), and 15 U.S.C. 1, (the Sherman Act) for compensatory, punitive and treble damages, injunctive relief, attorney's fees and costs.

Plaintiff, Dr. Radoslav Maric is a licensed obstetrician and gynecologist. Plaintiff has been practicing in the United States for 10 years and practiced previously for 5 years in the Europe. The individual defendants are licensed physicians with Medical Staff Privileges at St. Agnes Hospital in White Plains, N.Y., or officers of that hospital corporation during the relevant period. All parties are engaged in interstate commerce, including the purchase of equipment and supplies across state lines and the receipt of insurance payments from out-of-state carriers.

On July 1, 1989, plaintiff joined the Northeast Permanente Medical Group, P.C. ("NPMG") as a staff gynecologist and obstetrician. NPMG is a professional corporation that provides physician services to members of the Kaiser Foundation Health Plan of N.Y. ("Kaiser"), a Health Maintenance Organization ("HMO"). NPMG and Kaiser provide services under the name Kaiser Permanente. As required in his employment contract with Kaiser, plaintiff soon thereafter obtained staff privileges at St. Agnes Hospital. In the early 1980's plaintiff began considering establishing his own birthing center in which childbirth would occur in water. In the Fall of 1989, plaintiff began discussing his birthing center plans and ideas with defendant Stanley, the President of

St. Agnes Hospital. Plaintiff alleges that Stanley promised cooperation in his effort. On November 2, 1989, Stanley signed a non-disclosure agreement on behalf of St. Agnes. Thereafter, plaintiff found a location for his proposed center and began to seek financing.

In April, 1990 plaintiff contracted to purchase an existing obstetrics and gynecology practice. Plaintiff informed defendant du Vigneaud of his intention to purchase that practice. Plaintiff maintains that he had expected that Dr. du Vigneaud, who was also engaged in that area of practice and was associated with St. Agnes Hospital, would be supportive. Instead, plaintiff alleges that Dr. du Vigneaud and Mr. Stanley feared competition from plaintiff.

On May 21, 1990 defendant Stanley suspended plaintiff's hospital privileges based on charges that he had committed malpractice at the hospital. Plaintiff asserts that the suspension was in violation of the Hospital's by-laws because there were no exigent circumstances to justify a summary suspension, and that the charges were pretextual.

However, the papers submitted to this Court suggest that plaintiff's suspension occurred under circumstances amounting to a medical disaster. On November 26, 1989 Lori Cherry, a Kaiser subscriber, presented herself at St. Agnes. Ms. Cherry, who was five months pregnant, complained of abdominal pains. She was sent to the Labor and Delivery Floor were she vomited and became unconscious. She had no respiration or blood pressure. A code was called, and plaintiff was summoned for. By the time plaintiff and defendant Dr. Moshman arrived, Ms. Cherry spontaneously had regained blood pressure, pulse and respiration but remained in a

semicomatose state. Plaintiff examined her, concluded she did not have an obstetric problem, and left the hospital. Thereafter, Dr. Moshman, an internist, examined Ms. Cherry in order to rule out such differential diagnoses as shock, sepsis and drug toxicity.

Early on the morning of November 27, 1989, Ms. Cherry died. It was later ascertained that she died as a result of an ectopic pregnancy, which caused her to hemorrhage. The ectopic pregnancy had not been diagnosed by either doctor. As may be expected, plaintiff now contends the doctors who voted for his suspension were his competitors, and who felt threatened by his decision to establish his own birthing center. Defendants Campana, Newman, Weiss-Harrison, and Moshman maintain in affidavits submitted on their motion that they did not participate in the decision to suspend the plaintiff.

The Office of Health Systems Management of the New York State Department of Health investigated the death of Ms. Cherry. On May 10, 1990 that Department cited St. Agnes Hospital for deficiencies in connection with her care. The deficiencies included the failure to order an abdominal ultrasound, and failure of the obstetrician to remain with her despite her rapidly deteriorating condition.

As a result of his suspension, plaintiff was terminated from NPMG for failure to maintain staff privileges at St. Agnes Hospital, in compliance with his employment agreement.

When plaintiff appealed the summary suspension, defendant Nicolais appointed an *ad hoc* committee to hear the

appeal. The committee included doctors who, allegedly, were competitors or affiliated in their practice with competitors of plaintiff. On June 1, 1990, the committee recommended that the suspension be affirmed. On June 11, 1990, the Medical Board, including doctors competing with plaintiff, affirmed the summary suspension.

On June 18, 1990, plaintiff was permitted to appear before the Medical Board during its regularly scheduled meeting, but was not allowed to have his lawyer present. On June 21, 1990 the Medical Board reversed the suspension but imposed restrictions on Dr. Maric's privileges. On July 10, 1990, the Board of Trustees of St. Agnes Hospital affirmed the Medical Board's June 21, 1990 decision. Plaintiff contends that these restrictions were unreasonable.

In September, 1990, The Office of Professional Medical Conduct subpoenaed NPMG's personnel/credential file of plaintiff. In December, 1990, the administrator of the Estate of Lori Cherry commenced the inevitable wrongful death and malpractice suit, in which St. Agnes Hospital and Kaiser were named defendants.

By the end of July, 1990, allegedly as a result of the suspension and the restrictions placed upon him at St. Agnes Hospital, plaintiff's plan to purchase a medical practice came to an end. Plaintiff claims he attempted to secure employment after being terminated at NPMG, but was unsuccessful until September 1991.

Count I of plaintiff's complaint alleges that the joint actions of St. Agnes Hospital and its Board of Trustees and Medical Board constitute a group boycott, a *per se* violation of

Section One of the Sherman Act. To plead a violation of Section One, plaintiff must allege facts which show (1) a contract, combination or conspiracy; (2) that unreasonably restrains trade, and (3) in interstate or foreign commerce. *See Capital Imaging Associates P.C. v. Mohawk Valley Med. Assoc., Inc.*, 996 F.2d 537, 542 (2d Cir. 1993).

The Supreme Court has held that officers or employees of the same firm or corporation "do not provide the plurality of actors imperative for a section one conspiracy [because] agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984). Our Court of Appeals has recently affirmed a district court decision which held that "a hospital, its medical staff and its members are not separate entities and are therefore not legally capable of entering into a conspiracy in violation of the Sherman Act." *Balaklaw v. Lovell*, 822 F. Supp. 892, 902 (N.D.N.Y. 1993), *aff'd* No. 93-7484, 1994 WL 20848 (2d Cir. Jan 26, 1994). Furthermore, the *ad hoc* committee, the appeals board and the medical board lacked final authority. So, even if, as plaintiff maintains, defendants had a desire to sustain charges against him in order to eliminate or avoid competition, they could not do so because of the intervening power of the Board of Trustees to render a final impartial decision on the merits.

Plaintiff has not met his burden to show that a contract, combination or conspiracy caused his suspension and restrictions in order to restrain competition.

Furthermore, there is no factual showing of an unreasonable restraint on trade. A plaintiff who relies on a *per*

se analysis must demonstrate that the challenged activity will likely have predominant anti-competitive effects. *Balaklaw* 822 F.Supp at 904 citing *FTC v. Superior Trial Lawyers Ass'n.*, 441 U.S. 1, 19-20 (1979). Plaintiff's evidence does not rise to that level. Plaintiff still has restricted attending rights at St. Agnes Hospital. Plaintiff has not been "blacklisted" elsewhere by defendants. The charges of professional misfeasance against plaintiff do not seem to be trivial, nor does the final decision of the Trustees of St. Agnes seem inappropriate. Thereafter, plaintiff presented his contentions to the New York Public Health Council ("PHC"), challenging the limitations imposed upon his privileges. The PHC upheld the hospital. That administrative agency determination is entitled to weight, especially where it has not been challenged in state court review proceedings available under New York CPLR Article 78.

If plaintiff can not prove a *per se* violation, he must show "that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice." *Capital Imaging v. Mohawk Valley Medical Assoc.*, 996 F.2d at 543. Defendants, operating a single hospital, lacked the market power necessary to have a substantially harmful effect on competition in obstetrical services. Less than 4% of the population of Westchester County belonged to Kaiser. St. Agnes Hospital had less then 13% of the bassinet capacity in Westchester County, and some obstetrical cases are served by providers outside that County. Adverse effect on competition as a whole in the relevant (regional) market is thus not established by plaintiff, as required, and cannot be shown.

Our Court of Appeals has held that once a Federal Court

dismisses the claims over which it has original jurisdiction, it should dismiss the remaining state law claims without prejudice. *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 72 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); *See also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988); *Gibbs v. United Mine Workers*, 383 U.S. 715, 726 (1966).

Defendants' motions for summary judgment dismissing the federal claims are granted. The pendent state claims are dismissed without prejudice,

The Clerk shall enter final judgment.

SO ORDERED.

Dated: White Plains, New York
May 11, 1994

s/ CHARLES L. BRIEANT
Charles L. Brieant
U.S.D.J.

No. 95-930

Supreme Court, U.S.
FILED
JAN 11 1996

In The

Supreme Court of the United States

October Term, 1995

RADOSLAV MARIC, M.D.,

Petitioner,

vs.

ST. AGNES HOSPITAL CORP.; ROBERT J. STACKPOLE; ROBERT J. STANLEY; VINCENT DU VIGNEAUD, JR., M.D.; VINCENT NICOLAIS, M.D.; JOEL GREENSPAN, M.D.; MICHAEL PANIO, M.D.; DONALD N. COHEN, M.D.; VITO MARRERO, M.D.; BARNEY D. NEWMAN, M.D.; ADRIENNE WEISS-HARRISON, M.D.; ELLIOT MOSHMAN, M.D.; GERALD CAMPANA, M.D.; WILLIAM ZAROWITZ, M.D.; VIRGINIA PELLEGRINO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION OF THE ST. AGNES HOSPITAL RESPONDENTS

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QUESTION PRESENTED

Should this Court exercise its discretion to grant review on a writ of certiorari where (1) neither "question presented" was preserved by the Petitioner or addressed below and (2) the court below concluded, after a detailed factual review, that the Respondents' conduct was "reasoned" and "responsible" under established Supreme Court precedent.

STATEMENT UNDER RULE 29.6

In accordance with Rule 29.6 of the Rules of this Court, respondent St. Agnes Hospital Corp. states that it has no parent company or subsidiary that issues shares to the public.

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STATUTES AND RULES

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The St. Agnes Hospital Respondents[1] respectfully request that this Court deny the petition for a writ of certiorari seeking review of a decision of the United States Court of Appeals for the Second Circuit. As set forth below, the Second Circuit found this case to be a candidate for sanctions, because it amounted to nothing more than a transparent attempt to conjure a "baseless" federal antitrust claim from a reasonable restriction of the Petitioner's hospital privileges following the death of one of his patients and his refusal to come to the hospital to examine another. Neither of the "issues presented" by the Petitioner was raised by any party or decided by the courts below. The decision of the Second Circuit Court of Appeals presents no conflict with decisions of any other United States Court of Appeals or this Court. Accordingly, the Petition raises no issue worthy of this Court's review and should be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 65 F.3d 310 (2d Cir. 1995) and is reproduced in Petitioner's Appendix ("Pet. App.") at 3a. The memorandum and order of the United States District Court for the Southern District of New York is located at Pet. App. 12a.

STATEMENT OF THE CASE

The facts of the case are more fully set forth in the opinions of the Court of Appeals and the District Court, to which the Court is respectfully referred (Pet. App. 3a-7a and 13a-16a, respectively). Because the Petitioner has misstated the facts of the

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[1] St. Agnes Hospital Corp., Robert J. Stackpole, Robert J. Stanley, Vincent du Vigneaud, Jr., M.D., Joel Greenspan, M.D., Vincent Nicolais, M.D., Michael W. Panio, M.D., Donald M. Cohen, M.D., Vito Marrero, M.D., and Virginia Pellegrino will be collectively referred to as the "St. Agnes Hospital Respondents".

case, however, they are briefly summarized below. Contrary to Petitioner's contention that he disclosed "to the Respondents" his plans to open a birthing center and that his hospital privileges were thereafter "suspended" on "pretextual" bases (Pet. at 2-4), the undisputed facts confirm the Second Circuit's conclusion that the hospital, faced with "questionable conduct" by Dr. Maric, "followed a course of action that was reasoned, responsible, and attentive not only to its own interests but also to those of the public and Dr. Maric" (Pet. App. 7a). As the court surmised, Petitioner's claim was likely the product of "poor advice of counsel or [Petitioner's] inability to perceive that his personal ambitions must at times yield to the hospital's interest in the health and safety of its patients. . . ." (Pet. App. 7a).

A. Statement of Facts

On July 1, 1989, Northeast Permanente Medical Group, P.C. hired the Petitioner as a staff gynecologist and obstetrician. Thereafter, as required by his employment contract, he sought and obtained staff privileges at St. Agnes (Pet. App. 3a). Several months later, Petitioner alleges he told defendant Robert J. Stanley of his plans to open a birthing center which would feature "birth in water", and Dr. Stanley promised the hospital's cooperation and signed a non-disclosure agreement on behalf of the hospital (Pet. App. 3a).

On November 26, 1989, Lori Alisa Cherry, a 26-year old woman who was about five months pregnant, was admitted to St. Agnes complaining of severe abdominal pain. She subsequently lost consciousness, respiration and palpable blood pressure, and the Petitioner and an internist were called. By the time the Petitioner arrived, Ms. Cherry had spontaneously regained blood pressure and respiration but was in a semi-comatose state. Dr. Maric examined her, concluded that her condition was unrelated to her pregnancy and, after discussing the case with the internist, left the hospital. The Petitioner's diagnosis

proved wrong, because Ms. Cherry died a few hours later from a ruptured ectopic tubal pregnancy with massive intra-abdominal hemorrhage (Pet. App. 3a-4a).

St. Agnes undertook an immediate investigation into the incident through several standing committees (Pet. App. 4a). A peer review by the Obstetrics and Gynecology Department concluded in February of 1990 that Dr. Maric's management of the case was deficient because of his failure to order additional tests, obtain a surgical consultation and remain with the patient until a diagnosis was reached (Pet. App. 4a). One of the defendants, Dr. du Vigneaud, the Director of the Department of Obstetrics and Gynecology, presented the findings to the Board of Trustees Quality Assurance Committee, and recommended that the Petitioner's cases be monitored (Pet. App. 4a). Because of the seriousness of the case, the Quality Assurance Committee ordered further review and ultimately recommended that the hospital monitor both Dr. Maric's and the internist's cases for a period of six months (Pet. App. 5a).

As required by law, St. Agnes also reported the incident to the New York State Department of Health ("DOH"), which investigated the death (Pet. App. 4a). On May 10, 1990, the DOH cited St. Agnes for deficiencies in its treatment of Ms. Cherry, including the Petitioner's failure to order certain tests and his decision to leave the hospital despite Ms. Cherry's rapidly deteriorating condition (Pet. App. 5a-6a).

In the meantime, while the reviews of the incident by both St. Agnes and the DOH were underway, Dr. Maric informed Dr. du Vigneaud of his plans to establish a birthing center, and he alleges that Dr. du Vigneaud also pledged his cooperation (Pet. App. 5a).

Less than two weeks after the St. Agnes Quality Assurance Committee recommended that the Petitioner's cases be

reviewed, another incident involving Dr. Maric's judgment occurred. On May 4, 1990, a woman exhibiting signs of a possible miscarriage was admitted to the hospital and, although both the hospital and the woman's husband repeatedly called Dr. Maric, he refused to come, claiming that earlier he waited in vain for the woman and that he was not really needed. The woman subsequently miscarried (Pet. App. 5a).

Faced with the DOH's finding on May 10, 1990 that Dr. Maric's treatment of Ms. Cherry had been deficient, as well as the May 4th incident, the hospital summarily suspended Dr. Maric's privileges on May 17, 1990 (Pet. App. 6a). Thereafter, Dr. Maric requested, under the by-laws of the hospital, a review of his suspension by an ad hoc committee, which concluded that the suspension was appropriate. Dr. Maric then presented his case at a Medical Board meeting, which recommended that he instead be placed on probation for one year, conduct all work under strict supervision, and receive a letter of reprimand. This recommendation was accepted by the Board of Trustees of St. Agnes (Pet. App. 6a).

Dr. Maric challenged the limitation of his privileges before the New York Public Health Council, pursuant to N.Y. Public Health Law § 2801-b. The Public Health Council found no cause to credit the complaint of Dr. Maric (Pet. App. 18a; J.A. 162).[2]

B. The Proceedings Below

Alleging that the restriction on his privileges forced him to abandon his plans for the birthing center, Dr. Maric subsequently sued the hospital, its administrators, and various doctors claiming a group boycott in violation of the Sherman Act,

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[2] "J.A." refers to the Joint Appendix filed by the parties on appeal to the Second Circuit Court of Appeals.

and intentional interference with contract and prospective contractual relations under state law (Pet. App. 6a).

The St. Agnes Hospital Respondents moved to dismiss the complaint for failure to state a claim, contending that Maric failed to plead necessary elements of a violation of section 1 of the Sherman Act. The remaining defendants answered and moved for summary judgment. Maric responded to both motions by submitting a single memorandum of law, contending that he had established the requisite elements of his claims (see J.A. 107). At oral argument, the District Court converted the St. Agnes Respondents' motion into a motion for summary judgment and permitted Maric and the St. Agnes Respondents thirty days to submit any additional papers on the motion. Maric subsequently submitted only his own affidavit to oppose the motion (J.A. 123), and the St. Agnes Hospital Respondents submitted affidavits with exhibits (J.A. 148, 287). At no point did the Petitioner serve a discovery request, nor did he submit an affidavit pursuant to Fed. R. Civ. P. 56(f) in response to the motions.

The District Court then granted summary judgment on the antitrust claim and dismissed the pendent state law claim without prejudice, holding that the hospital and its medical staff were not legally capable of conspiring, and that, in any event, Maric failed to raise a triable issue as to the existence of an unreasonable restraint on trade (Pet. App. 17a-19a).

The Second Circuit affirmed the dismissal. It did not reach the issue whether the hospital was legally capable of conspiring with its staff (Pet. App. 8a). Instead, after a detailed factual review, the Court of Appeals held that, even assuming legal capacity to conspire, the Petitioner failed to create a genuine issue of material fact as to the existence of a conspiracy to restrain trade, because he failed to cast doubt on inferences of proper conduct by the defendants, as required by applicable precedent:

> We do not have the slightest doubt that defendants acted properly when they decided to limit Dr. Maric's staff privileges. . . . There is no credible dispute that [the] lengthy review process yielded serious, legitimate concerns as to plaintiff's conduct. The hospital's ultimate decision to allow Dr. Maric to maintain his staff privileges under supervision instead of suspending or revoking them, under these circumstances, was generous towards the plaintiff.
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> * * * *
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> This case might well be a candidate for sanctions in light of the baseless nature of plaintiff's antitrust claim and the waste of resources that it has generated . . . .

(Pet. App. 9a-10a).

REASONS FOR DENYING THE WRIT

I.

PETITIONER FAILED TO REQUEST DISCOVERY OR TO PRESERVE THE ISSUE BELOW

Petitioner first contends that this Court should grant certiorari because he was "prevented" from taking any discovery to show that the bases for restricting his privileges were "pretextual" (Pet. at i and 3). Plaintiff's statement is misleading and factually incorrect.

Contrary to the clear mandate of the Federal Rules of Civil Procedure and the law of this Circuit, *Paddington Partners v. Bouchard,* 34 F.3d 1132, 1137 (2d Cir. 1994); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), the Petitioner never filed an affidavit pursuant to Fed. R. Civ. P. 56(f) to seek discovery he now says was necessary to oppose the motions. In fact, at no point did the Petitioner ever serve a single discovery request. Rather, he repeatedly contended at each stage of the proceedings below that he had established the elements of his claims with the only "evidence" presented -- his own affidavit. Accordingly, Petitioner has failed to preserve this issue for review. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n.7 (1982). The Court should decline to address this issue, raised for the first time in the Petition. *See United States v. Ortiz,* 422 U.S. 891, 898 (1975).

II.

AN EFFECT ON INTERSTATE COMMERCE IS NOT IN DISPUTE

Petitioner's second "question presented" raises another issue for the first time in the Petition, curiously on a point conceded by the St. Agnes Hospital Respondents. Petitioner apparently asks the Court to decide whether a group boycott by independent physicians and a hospital can affect interstate commerce sufficiently to violate the Sherman Act (Pet. at i and 5). An effect on interstate commerce is certainly one element of a Sherman Act violation. However, none of the defendants ever raised this issue in their motions, nor did Petitioner address it below. Indeed, the District Court found that "[a]ll parties are engaged in interstate commerce, including the purchase of equipment and supplies across state lines and the receipt of insurance payments from out-of-state carriers" (Pet. App. 13a). Because Petitioner did not argue it, this issue was not addressed

by the Court of Appeals. Consequently, it is not now properly before this Court.

III.

NO CONFLICT EXISTS BETWEEN THE DECISION BELOW AND THE PRECEDENT OF THIS COURT

A. The Court of Appeals Did Not Reach the Issue Whether Petitioner Met the Criteria for *Per Se* Treatment

As discussed above, the effect of a purported boycott on interstate commerce is not at issue in this case. In fact, the Petitioner does not discuss this issue in the text of the petition accompanying the question he posed (Pet. at 5). Instead, the Petitioner appears to argue in the text that he was not required to establish a genuine issue concerning the alleged harmful effect on competition because this conduct was *per se* unlawful, purportedly placing the Second Circuit's decision in conflict with precedent of this Court. At best, the Petitioner is confused about the basis for the Second Circuit's opinion and misconstrues this Court's decisions.

The District Court found that the Petitioner did not establish a *per se* violation because he did not "demonstrate that the challenged activity will likely have predominant anti-competitive effects" (Pet. App. 18a). Contrary to the Petitioner's representation, the Court of Appeals did not reach this issue. Rather, the Court of Appeals held, based upon facts specific to this case, that the Petitioner had failed to raise a triable issue concerning the existence of unlawful concerted action (Pet. App. 8a-10a). Thus, while the Court of Appeals affirmed the dismissal of the action, it did so on grounds other than those suggested by

the Petitioner. Accordingly, review by this Court of an issue not reached by the Court of Appeals is unnecessary and unwarranted.

B. Well-Established Precedent Mandated a Rule of Reason Analysis and the Establishment of an Unreasonable Restraint of Trade

In any event, Petitioner has posited (without articulating) an illusory conflict between the District Court's opinion and this Court's prior decisions. The District Court's application of the rule of reason to Petitioner's antitrust claim accords with the applicable precedent of this Court as well as legions of cases throughout the country which have considered this issue.

The cases cited by the Petitioner, *United States v. General Motors Corp.*, 384 U.S. 127 (1966) and *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457 (1941), merely stand for the proposition that a group boycott may, under certain circumstances, be illegal *per se*. Petitioner ignores more recent opinions of this Court which significantly limit the application of the *per se* rule to group boycotts by firms that possess either market power or exclusive access to an element the plaintiff needs for essential competition. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985).

The Court in *Northwest* explained that its prior decisions had applied the *per se* rule only when the practices at issue could not be justified by plausible arguments that they were intended to enhance overall competition and thereby make relevant markets more competitive. *Id.* A hospital has an "unquestioned right to exercise some control over the identity and number of physicians to whom it accords staff privileges". *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 30 (1984). Staff privilege restrictions help a hospital to "provide more efficient, higher quality service in order to compete against other hospitals." *Bhan v. N.M.E. Hospitals, Inc.*, 929 F.2d 1404, 1412 (9th Cir. 1991), *cert.*

denied, 502 U.S. 994 (1991). Therefore, precisely because staffing decisions have a significant procompetitive effect, a rule of reason is invariably used to evaluate their antitrust legality. *Flegel v. Christian Hosp.*, 4 F.3d 682, 686 (8th Cir. 1993); *Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558, 1571 (10th Cir. 1991); *Willman v. Heartland Hosp. East*, 836 F. Supp 1522, 1527 (W.D. Mo. 1993), *aff'd*, 34 F.3d 605 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1361 (1995). Hospital staffing decisions are simply not so "plainly anticompetitive that no elaborate study of the industry is necessary." *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

The District Court's opinion therefore is not only in accord with firmly established precedent of this Court, but is consistent with virtually every district or circuit court that has addressed this issue. In the words of the Seventh Circuit:

> This case involves one hospital's decisions about staff privileges and staffing patterns. The cases involving staffing at a single hospital are legion. Hundreds, perhaps thousands of pages in West publications are devoted to the issues those circumstances present. Those cases invariably analyze those circumstances under the rule of reason -- there is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many, or all.
>
> * * *
>
> Those hundreds or thousands of pages almost always come to the same conclusion: the staffing decision at a single hospital was not a violation of section 1 of the Sherman Act [citing cases]

BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hospital Ass'n, 36 F.3d 664, 667 (7th Cir. 1994).

To reiterate, although this issue was not addressed by the Second Circuit, the District Court's dismissal of Petitioner's antitrust claim upon his failure to establish a *per se* violation is in accordance with well-established precedent of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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No. 95-930

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In The

Supreme Court of the United States

October Term, 1995

RADOSLAV MARIC, M.D.,

Petitioner,

vs.

ST. AGNES HOSPITAL CORP.; ROBERT J. STACKPOLE; ROBERT J. STANLEY; VINCENT DU VIGNEAUD, JR., M.D.; VINCENT NICOLAIS, M.D.; JOEL GREENSPAN, M.D.; MICHAEL W. PANIO, M.D.; DONALD N. COHEN, M.D.; VITO MARRERRO, M.D.; BARNEY D. NEWMAN, M.D.; ADRIENNE WEISS-HARRISON, M.D.; ELLIOT MOSHMAN, M.D.; GERALD CAMPANA, M.D.; WILLIAM ZAROWITZ, M.D.; VIRGINIA PELLIGRINO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS NEWMAN, WEISS-HARRISON, MOSHMAN, CAMPANA, AND ZAROWITZ

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QUESTIONS PRESENTED

1. Should this Court review petitioner's contention that summary judgment should not have been granted because he did not have an opportunity to conduct discovery, where petitioner did not submit an affidavit pursuant to Fed. R. Civ. P. 56(f) to the District Court, and he did not press the discovery issue before the Court of Appeals?

2. Should the petition be granted in order to review whether the alleged group boycott by the defendants constituted an unreasonable restraint of trade per se, where the issue was not passed upon by the Court of Appeals?

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COUNTERSTATEMENT OF THE CASE

1. Factual Background

The relevant background of the case is set forth in detail by the Court of Appeals. (*See* pages 3a to 7a of the appendix to the petition).

We add, in response to Dr. Maric's contention that a diagnosis of the ectopic pregnancy was made impossible by Mrs. Cherry's cocaine use (p. 4), that he took a different position in the affidavit he submitted to the District Court in opposition to summary judgment. There, he acknowledged that the ectopic pregnancy could have been detected by ultrasound; and, he was criticized by several entities for failing to order such a test (J53-J54, J136, J138, J156, J250 (reference is to joint appendix submitted to the Court of Appeals)).

We also add that before this action was commenced, petitioner sought review of the limitations placed on his hospital privileges from the New York Public Health Council (PHC). (J162, J281-J286).

> Under New York Law, a hospital may terminate a physician's privileges only "for reasons limited to patient welfare, institutional objectives and character or competency of the physician", *Fried v. Straussman*, 41 N.Y.2d 376, 377, 393 N.Y.S.2d 334, 335, 361 N.E.2d 984, 985 (1977). A physician who wants his privileges restored must file a complaint with the New York Public Health Council ('PHC') prior to seeking redress in the courts. See *Guibor v. Manhattan Eye, Ear and Throat Hosp., Inc.*, 46 N.Y.2d 736, 413 N.Y.S. 2d 638, 386

> N.E.2d 247 (1978). A primary function of the PHC is to determine whether there is a medical justification for the withdrawal of the doctor's privileges. Thus, a court must dismiss any suit brought by a physician seeking reinstatement of his privileges if the physician has not exhausted his remedies before the PHC.
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> * * *
>
> The PHC's mission is to "consider any matter relating to the preservation and improvement of public health". N.Y.Pub.Health L. 225. The PHC customarily passes on cases where a doctor complains that a hospital unfairly terminated his privileges. In disposing of these cases, the PHC draws upon the vast medical knowledge of its members.

Johnson v. Nyack Hospital, 964 F.2d 116, 120-121 (2nd Cir. 1992). The PHC found no cause to credit petitioner's complaint. (J17, J162).

2. Proceedings Below

On March 4, 1994, defendants Barney D. Newman, M.D., Adrienne Weiss-Harrison, M.D., Eliot Moshman, M.D., Gerald Campana, M.D., and William Zarowitz, M.D., at one time all salaried employees of Northeast Permanente Medical Group, P.C. (hereinafter NPMG defendants), moved for an order, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, granting summary judgment dismissing the action against them on the merits, or, alternatively, for an order pursuant to Rule 12(b)(6) dismissing the action for failure to state a cause of

action. (J20-J21). The grounds for the relief requested included that they had not engaged in an illegal conspiracy.

On March 4, 1994 the codefendants (hereinafter St. Agnes defendants) moved for an order dismissing the action pursuant to Fed. R. Civ. P. 12(b)(6). (J88-J89).

Plaintiff submitted only a memorandum of law in the opposition to the two motions. (J4, J107-J122).

The motions were argued before Charles L. Brieant, United States District Judge, on March 25, 1994. Judge Brieant converted the St. Agnes defendants' motion to dismiss to a motion for summary judgment, and gave the plaintiff and the St. Agnes defendants until April 29, 1994 to file additional papers. (J5). Both submitted affidavits on April 29th. (J123-J309).

On May 11, 1994 Judge Brieant granted the defendants summary judgment dismissing the federal claims. The pendent state claims were dismissed without prejudice. (12a-19a).

On September 13, 1995, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court. (1a-11a).

SUMMARY OF ARGUMENT

1. In moving for summary judgment, defendants presented compelling evidence that petitioner's hospital privileges were restricted because of bona fide health care concerns. Petitioner opposed the motion, arguing that the defendants' actions were a pretext to limit competition. Petitioner did not ask the District Court, through submission of an affidavit pursuant to Fed. R. Civ. P. 56(f), to defer determination of the motion until after he had conducted discovery. Likewise, at the Court of Appeals

petitioner did not seek reversal on the ground that the District Court should have deferred determination of the motion until after discovery.

Petitioner failed to preserve for review the issue of whether discovery should have been allowed before summary judgment was granted; and, petitioner's case does not warrant deviating from the general rule barring consideration of an issue not pressed or passed upon below.

2. The Court of Appeals affirmed summary judgment solely on the grounds that "no conspiracy has been shown" (8a). The second issue raised by petitioner, whether the alleged group boycott of the defendants constituted an unreasonable restraint of trade, was only passed upon by the District Court. No compelling reason exists to review the holding of the District Court, which is not in conflict with appellate precedent.

REASONS FOR DENYING THE WRIT

I.

REVIEW SHOULD BE DENIED BECAUSE PETITIONER DID NOT RAISE BELOW THAT HE NEEDED DISCOVERY IN ORDER TO PRESENT FACTS ESSENTIAL TO JUSTIFY OPPOSITION TO SUMMARY JUDGMENT.

In order to establish a violation of Section 1 of the Sherman Act, "plaintiff's evidence must prove the actors had an intent to adhere to an agreement that was designed to achieve an unlawful objective, . . ." *Capital Imaging v. Mohawk Valley Medical Assoc.*, 996 F.2d 537, 545 (2nd Cir.), *cert. denied*, 114 S. Ct. 388 (1993). Dr. Maric alleges that an illegal agreement underlied the St. Agnes Hospital peer review proceedings that ultimately

resulted in the limitation of his hospital privileges. He contends that those proceedings did not have a bona fide relationship to patient welfare or his competence, but were a subterfuge for hampering his ability to open a birthing center that would compete with St. Agnes Hospital and some of the other defendants for deliveries.

The peer view process serves the important proconsumer function of improving the quality of health care. While there is a risk that the process may be exploited for the private financial gain of the established medical staff, legitimate peer review would be severely chilled if the affected physician was too easily allowed to wield the heavy hammer of antitrust law in retaliation for adverse peer review determination. *See Capital Imaging*, 996 F.2d at 539. As such, summary judgment remains a vital procedural tool to weed out unmeritorious antitrust actions. *See Capital Imaging v. Mohawk Valley Medical Assoc.*, 996 F.2d at 541, *supra*.

To survive a motion for summary judgment, an aggrieved physician is required, among other things, to present evidence that tends to exclude the possibility that the hospital's actions were the result of legitimate health care concerns. *See Matsushita Elect. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *cf. Johnson v. Nyack Hosp.*, 964 F.2d 116, 121, *supra* (termination of surgical privileges for proper medical reasons dispositive of antitrust action).

In moving for summary judgment, the defendants presented compelling evidence that they did not use the peer review process as a pretext for anticompetitive designs.

First, various committees and departments of St. Agnes Hospital were sharply critical of petitioner's handling of the Cherry case *before* April, 1990, the month when petitioner

charges that the conspiracy arose following his announcement to defendants Stanley and du Vigneaud of his decision to purchase a private medical practice. (Appellant's Court of Appeals' brief, pp. 5, 6; J10, J128).

Second, negative evaluations of the management of Lori Cherry's care were not confined to petitioner. Some of the hospital's own procedures were found to be deficient, and were changed. (J155). Furthermore, Dr. Moshman's actions did not escape criticism, and he received the same treatment from the Board of Trustees for the Cherry case as did Dr. Maric, including the monitoring of his cases for six months. (J247-J248).

Third, an independent entity, the New York State Department of Health, corroborated much of the hospital's investigation. Among other things, it noted that the cause of death was a ruptured ectopic pregnancy, and it was critical of the failure of the obstetrician to remain with the patient. (J54).

Fourth, the hospital's actions were based on extensive reviews of the medical care at issue.

Fifth, the New York Public Health Council found that there was no cause to credit petitioner's complaint that his privileges were wrongly restricted.

In opposing summary judgment, petitioner did not file an affidavit pursuant to Fed. R. Civ. P. 56(f), which provides:

> WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the

> application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Such an affidavit must explain "(1) what facts are sought and how they are to be obtained; (2) how those facts are reasonably expected to create a genuine issue of material fact; (3) what effort the affiant has made to obtain them; and (4) why the affiant was unsuccessful in those efforts." *Hudson River Sloop Clearwater v. Dept. of Navy,* 891 F.2d 414, 422 (2nd Cir. 1989).

In the brief petitioner submitted to the Court of Appeals, he did not contend that the District Court should have allowed him to conduct discovery before passing on defendants' motions for summary judgment. Rather, he argued that the papers he submitted to the District Court were sufficient to defeat the motion.

In the opposing brief submitted to the Court of Appeals on behalf of the NPMG defendants, we noted that:

> Finally, plaintiff's affidavit in opposition to summary judgment did not assert that he could not present by affidavit facts essential to justify his opposition, and needed discovery to be had in order to do so. FRCP 56(f); *Hudson River Sloop Clearwater v. Dept. of Navy,* 891 F2d 414, 422 (2d Cir 1989) * * * In addition, on appeal the plaintiff does not assert that the court below erred in failing to give him a continuance.

(Page 39). Petitioner's reply brief in the Court of Appeals did not

contest the above assertion, nor did it request an opportunity for discovery.

Ordinarily, this Court "will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget*, 486 U.S. 94, 99, footnote 5. Only in exceptional cases will questions not pressed or passed upon below be reviewed. *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

This is not an exceptional case for reviewing an issue not raised or passed upon below. The Second Circuit characterized the merits of the antitrust claim as "baseless" (7a), and a request for further discovery in order to oppose summary judgment cannot, in general, be raised for the first time on appeal. 6 (Part 2) Moore's Federal Practice, ¶ 56.24, at 56-820 to 56-821.

II.

REVIEW SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DID NOT PASS UPON WHETHER THE ALLEGED GROUP BOYCOTT CONSTITUTED AN UNREASONABLE RESTRAINT OF TRADE PER SE.

Petitioner is incorrect when he asserts that the Court of Appeals affirmed the finding of the District Court that he failed to show an adverse effect on competition as a whole. The Court of Appeals affirmed the judgment below solely on the ground that "no conspiracy has been shown." (8a).

An allegedly erroneous District Court decision is not ordinarily a basis for granting a writ of certiorari. S. Ct. R. 10.1. Furthermore, the District Court granted summary judgment on more than one ground, and petitioner does not seek review of all of them. Lastly, the District Court's determination was not in

conflict with decisions of this Court or Courts of Appeals. (*See* pages 25 to 27 of the brief of the St. Agnes defendants before the Court of Appeals).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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